MY HOME BUDGET HOTEL SDN BHD v. CIMB BANK BHD

HIGH COURT MALAYA, KUALA LUMPUR
ONG CHEE KWAN JC
[SUIT NO: WA-22NCC-154-03-2020]
17 DECEMBER 2021

Abstract – *The customer's claim against the bank for unlawfully disclosing and providing copies of its bank statements to a third party without its consent or authority cannot possibly succeed as the bank statements are crucial for the ongoing suit in court. The protection, confidentiality and secrecy accorded to the customer by the Financial Services Act 2013, the Bankers' Books (Evidence) Act 1949 and the Personal Data Protection Act 2010 must be balanced with the court's interest to have before it all the relevant facts and information as would assist it to come to a just, well-informed and well-reasoned decision. The bank's duty of secrecy owed to the customer having been outweighed by the requirements of the Evidence Act 1950, the bank is legally obliged to disclose the relevant statements to the court.*

BANKING: *Banker and customer – Production of customer's bank accounts – Production by bank of customer's bank accounts during course of trial of suit – Bank served with subpoena to address question as to whether customer's account had sufficient funds – Whether bank wrongfully disclosed and provided customer's bank statements to third party without consent – Whether there was breach of relevant legislations – Whether bank complied with procedure prescribed by law to produce customer's account statements as documentary evidence – Whether there was breach of fiduciary duty – Failure to call material witness – Whether adverse inference invoked under s. 114(g) of Evidence Act 1950 – Whether bank's duty of secrecy outweighed by requirements of s. 132 of Evidence Act 1950 – Financial Services Act 2013, s. 133 – Personal Data Protection Act 2010, s. 7 – Bankers' Books (Evidence) Act 1949, s. 6*

The plaintiff, a customer of the defendant, had opened a current account at the defendant's branch in Lucky Garden, Bangsar. The plaintiff's claims in this action revolved around the production by the defendant of certain bank statements of the plaintiff's account by the defendant's assistant manager during the course of the trial in a suit ('Suit 509'). In Suit 509, the defendant's assistant manager, En Zafri, was served with subpoenas by the claimant in respect of the plaintiff's account. The purpose for the subpoenas was to address the questions at the Suit 509 trial as to whether the plaintiff's account had sufficient funds to pay out certain cheques that the plaintiff had issued to the claimant. It was the plaintiff's case in the present action that the defendant's assistant manager had, without the plaintiff's consent and in

breach of relevant legislations, wrongfully disclosed and provided the plaintiff's bank statements to a third party, more specifically, the claimant's solicitors in Suit 509. Briefly, the claimant's solicitors in Suit 509 served a sealed copy of a subpoena to testify and produce documents to the manager of the defendant's branch, requiring him to attend court with bank statements of the plaintiff's account for the period of six months from 15 July 2015 to 15 December 2015. En Zafri was tasked to attend court to testify and produce the relevant statements for the plaintiff's account in Suit 509. From the notes of proceedings, it was clear that En Zafri did not hand over the bank statements to the court and/or to any of the parties to the proceedings during the course of his testimony. Counsel for the plaintiff, Mr Sri Dev Nair (who happened to also act for the plaintiff in this action) had initially objected to En Zafri's attendance to give evidence on the plaintiff's account. The objection was premised primarily on the issue of confidentiality of the plaintiff's account. The trial judge had overruled the objection but limited the questions to be asked of En Zafri to only one question, namely whether there was sufficient money in the account to honour the cheques at the date of the cheques. The bank statements were not handed over by En Zafri to anyone including the court. After En Zafri completed his testimony, he left the court with the bank statements. The proceedings in Suit 509 continued. During cross-examination of another witness, counsel for the claimant, Mr Selvam, sought leave of the court to refer the witness to a copy of the plaintiff's bank statement. At this time, the trial judge was informed that the said document sought to be introduced was part of the documents that En Zafri had brought along with him pursuant to the subpoena and that the documents were not produced to the court during En Zafri's testimony. Mr Selvam had informed the trial judge that the bank statements had been handed to him by En Zafri subsequent to his testimony. Counsel for the plaintiff, Mr Suaran, had raised objection again to the documents contending that these bank statements ought to be tendered through En Zafri but the trial judge dismissed Mr Suaran's objection. These bank statements adduced by Mr Selvam were subsequently compiled and filed as an additional bundle of documents for the trial. On 4 April 2019, the solicitors for the claimants in Suit 509 filed an application to recall En Zafri and pursuant to this application, the trial judge made the following orders, *inter alia* (i) leave was granted to recall En Zafri to verify the documents contained in the common bundle of documents; (ii) the claimant was allowed to refer the documents contained in the common bundle of documents; and (iii) En Zafri to produce the relevant bank statements and additional documents ('court order dated 4 April 2019'). On 16 July 2019, En Zafri was recalled to give evidence and he had confirmed to the court the documents in the bundle of documents that was filed in Suit 509 containing the bank statements of the plaintiff's account. In this present action, it was the plaintiff's case that En Zafri had, without its consent and authority, released to Mr Selvam the bank statements of the plaintiff's

account. The plaintiff claimed through PW1 and PW2 that En Zafri had, on 3 October 2018, handed over these bank statements to Mr Selvam outside the court room prior to the commencement of the trial of Suit 509. Additionally, the plaintiff also relied on the notes of proceedings for Suit 509 where Mr Selvam had informed the court that he had received the bank statements from En Zafri subsequent to En Zafri's testimony. On the other hand, it was the defendant's case that En Zafri had never given to Mr Selvam the bank statements of the plaintiff's account at all and that En Zafri had only tendered the bank statements to the court when he was recalled on 16 July 2019. In fact, En Zafri had repeatedly maintained this position when he was asked more than once by Mr Suaran whether he had handed the bank statements to anyone prior to his testimony that day. The issues to be determined by this court were (i) whether En Zafri did give to Mr Selvam the bank statements of the plaintiff's account; (ii) whether the defendant was in breach of any statutory and/or contractual duty to the plaintiff; (iii) whether the defendant complied with the procedure prescribed by law to produce the plaintiff's account statements in court as documentary evidence; (iv) whether there was breach of statutory obligation under Financial Services Act 2013; (v) whether there was breach of statutory obligation under Personal Data Protection Act 2010; (vi) whether there was breach of statutory duty/procedure under Bankers' Books (Evidence) Act 1949; (vii) whether there was breach of obligation under contract law; and (viii) whether there was breach of fiduciary duty under common law.

Held (dismissing plaintiff's action against defendant):

(1) PW1 was at the material time the 'Admin Manager' of the law firm that represented the claimant for Suit 509. He was a dispatch for the law firm and was not conversant in the English language. According to PW1's testimony, he and PW2 were standing together outside the court room on the morning of 3 October 2018 and he saw Mr Selvam with a 'gentleman' he identified as En Zafri. He and PW2 were about four to five meters away from Mr Selvam and that he could clearly hear the conversation (in English) between Mr Selvam and En Zafri and claimed he saw En Zafri give the bank statements of the plaintiff's account to Mr Selvam. PW1's testimony, however, was found to be incredulous. In the first place, PW1 himself admitted that he had never met En Zafri and would not have known if the 'gentleman' who allegedly was speaking to Mr Selvam on the said morning was indeed En Zafri. Given that En Zafri had denied the meeting, it was doubtful if there was indeed such a meeting as claimed. PW1 had testified the presence of an Indian lady who was purportedly given the documents by Mr Selvam to make copies but no attempts were made to procure the Indian lady to corroborate PW1's evidence at all. Similarly, PW2, who was the director of the plaintiff, testified that he was with PW1 outside the court

room. He, like PW1, had little understanding of the English language. PW2's testimony suffered from the same lack of credibility as PW1's testimony given that both of them were several meters from the alleged discussion between Mr Selvam and En Zafri. In his testimony, En Zafri had maintained that he did not hand over the bank statements to anyone except the court and that he had possession of the bank statements on 3 October 2018 at all times. This could have been contradicted by the Indian lady or Mr Selvam but the plaintiff had chosen not to call either of them to testify. Accordingly, this court was unable to accept both PW1's and PW2's evidence in respect of the event that had purportedly taken place on the morning of 3 October 2018 outside the court room where En Zafri was said to have handed over the bank statements of the plaintiff's account to Mr Selvam as contended. (paras 34-43 & 48)

(2) The plaintiff's entire cause of action was premised on the allegation that the defendant had unlawfully disclosed and provided copies of the plaintiff's bank statements of the plaintiff's account to Mr Selvam or a third party without its consent or authority. Clearly, the burden of proof to establish this allegation of fact must necessarily lie with the plaintiff. It would be for the plaintiff to decide whom they wished to call to establish that fact to satisfy the court on the balance of probability that the defendant did indeed wrongfully give the bank statements of the plaintiff's account to Mr Selvam. Mr Selvam's statement to the trial judge had been categorically denied by En Zafri. It was not for the defendant to call Mr Selvam as it was not the defendant who sought to establish the allegation that Mr Selvam had been given the bank statements from En Zafri. This was the plaintiff's assertion. The fact that Mr Selvam had possession of the bank statements did not mean that the same was given to him by En Zafri. Mr Selvam could have obtained these documents from other sources. The plaintiff could have sued or even issued a subpoena against Mr Selvam to establish its assertion. He did not. Its failure to call Mr Selvam as a witness to testify as to how he had obtained the bank statements of the plaintiff's account from the bank officer was not explained. This failure by the plaintiff to call Mr Selvam would give rise to an adverse inference under s. 114(g) of the Evidence Act 1950. The plaintiff had not established, on the balance of probabilities, that the defendant had given the bank statements of the plaintiff's account to Mr Selvam and/or any third party without the plaintiff's consent or authority. The plaintiff's claims against the defendant had no merits at all and must be dismissed as the plaintiff had not discharged its burden of proof that the defendant had wrongfully disclosed its bank statements to Mr Selvam and/or any third party. (paras 56-60, 64 & 68)

(3) The subpoena *duces tecum* issued to the defendant were under the court seals and constituted an order to produce the documents stated therein to the court. In fact, it was a form of command to the person named in the subpoena to attend court at such time and date as may be stated therein. There was no legal requirement for the defendant to make an application to object or set aside the subpoenas at all. The plaintiff had notice of the subpoenas and counsel for the plaintiff was able to make his objections to the subpoenas at the trial of Suit 509, *albeit* unsuccessfully. This court was unable to accept the plaintiff's contention on the 'procedural requirements'. (paras 73 & 74)

(4) Section 133 of the Financial Services Act 2013 ('FSA'), which provides that the defendant and/or defendant's officers shall not disclose any documents or information relating to the plaintiff's affairs accounts to third parties, is not an absolute prohibition. Banking documents are permitted to be disclosed under s. 134 of the FSA read with sch. 11 where (i) the customer has given his written consent in writing for such disclosure; or (ii) there is a court order not lower than the Sessions Court compelling the bank to make such disclosure. Given that the bank statements of the plaintiff's account were tendered in Suit 509 pursuant to the court orders, the plaintiff's claim based on a breach of s. 133 of FSA by the defendant was without merit. (paras 76, 78 & 80)

(5) Section 7 of the Personal Data Protection Act 2010 ('PDPA') has no application to the data of a corporate entity. Where the documents in question were relevant and admissible, a party could not use the PDPA as a shield to prevent the said documents from being produced at trial under the guise of personal data protection. The plaintiffs' claim based on the PDPA was flawed. Further, there was no wrongful disclosure whatsoever of the bank statements of the plaintiff's account by the defendant under s. 6 of the Bankers' Books (Evidence) Act 1949 ('BBEA'). (paras 81, 84, 85, 87 & 107)

(6) The trial judge had considered the relevancy of the bank statements of the plaintiff's account and decided that these documents were crucial for Suit 509 and that En Zafri had to produce the same to court and be examined in Suit 509. Therefore, the protection of confidentiality and secrecy accorded to a party in the FSA, the Bankers' Books (Evidence) Act 1949 and the PDPA has to be balanced with the interest of the court to have available before it the relevant information and the fact in order for the court's determination of the legal and factual issues that are being confronted in any of its proceedings. The defendant's duty of secrecy owed to the plaintiff was outweighed by the requirements of the Evidence Act 1950, in particular s. 132 thereto, and En Zafri was obliged to disclose the bank statements of the plaintiff's account to assist the court in Suit 509. (paras 101 & 102)

(7) The plaintiff had signed the Account Opening Application Form and declared under cl. 8 thereof that the plaintiff expressly agreed and authorised the defendant to disclose to any person any information about or with regard to its affairs and/or banking accounts as authorised by law or for such purposes as the defendant deemed fit in its interest to do so. With such written consent, the defendant's disclosure of the information/documents of relating to its affairs or account was permitted under the law, as the trial judge had made the requisite order on 4 April 2019 for the disclosure of the bank statements of the plaintiff's account as well as allowed the claimant's solicitor's leave to tender the said documents through En Zafri. (paras 111 & 112)

(8) The plaintiff's current account with the defendant only concerned deposits and withdrawals. The relationship between the plaintiff and the defendant was therefore one of creditor and debtor, and not a fiduciary one. Therefore, the plaintiff's cause of action based on a breach of fiduciary duty simply could not be sustained. The plaintiff had therefore failed to prove its case. (paras 115, 118 & 119)

Case(s) referred to:

Aseambankers Malaysia Bhd & Ors v. Shencourt Sdn Bhd & Anor [2014] 2 CLJ 773 CA ***(refd)***

B A Rao & Ors v. Sapuran Kaur & Anor [1978] 1 LNS 14 FC ***(refd)***

Chan Yoke Lain v. Pacific & Orient Insurance Co Sdn Bhd [1999] 1 CLJ 179 CA ***(refd)***

Dea Ai Eng v. Dr Wong Seak Shoon & Anor [2007] 7 CLJ 337 HC ***(refd)***

Foley v. Hill & Others [1843-60] All ER Rep 16 ***(refd)***

Kian Lup Construction v. Hongkong Bank Malaysia Bhd [2002] 7 CLJ 32 HC ***(refd)***

Newlake Development Sdn Bhd v. Zenith Delight Sdn Bhd & Ors (No 2) [2021] 7 CLJ 88 HC ***(refd)***

Pit Stop Auto Accessories v. Tan Kock Siang; The Minister Of Communications (Applicant) [1974] 1 LNS 112 HC ***(refd)***

Protasco Bhd v. Tey Por Yee & Anor And Other Appeals [2021] 9 CLJ 349 FC ***(dist)***

Raja Segaran S Krishnan v. Bar Council Malaysia & Ors [2001] 2 CLJ 44 HC ***(refd)***

Rotta Research Laboratorium SPA & Anor v. Ho Tack Sien & Ors; Chai Yuet Ying (Third Party) (No 2) [2011] 1 LNS 597 ***(refd)***

Legislation referred to:

Bankers' Books (Evidence) Act 1949, s. 6
Evidence Act 1950, ss. 101, 103, 114(g), 132, 162
Financial Services Act 2013, ss. 133, 134(1), (2), Sch. 11
Personal Data Protection Act 2010, ss. 4, 7
Rules of Court 2012, O. 24 r. 7A

For the plaintiff - Sri Dev Nair & Isweljet Singh; M/s Iswel Dhillon & Co
For the defendant - Yoong Sin Min & Heng Chia Leng; M/s Shook Lin & Bok

Reported by Suhainah Wahiduddin

JUDGMENT

Ong Chee Kwan JC:

Background Facts

[1] At all material times, the plaintiff is the customer of the defendant and had opened an account at the defendant's branch at Lucky Garden, Bangsar which carries on the business at No. 21, Lorong Ara Kiri Satu, Lucky Garden, Bangsar, 59100 Kuala Lumpur (hereinafter referred as 'the defendant's branch').

[2] The plaintiff opened a current account no. 80-0091214-4 at the defendant's branch ('the account').

[3] The plaintiff's claims in this action revolve around the production by the defendant of certain bank statements of the plaintiff's account by the defendant's assistant manager during the course of the trial in Suit No. WA-22NCvC-509-09-2017 ('Suit 509').

[4] In Suit 509, the defendant's assistant manager, one Encik Zafri bin Hassan ('En Zafri' or 'DW1') was served with subpoenas by the claimant in respect of the plaintiff's account. The purpose for the subpoenas was to address the question at the Suit 509 trial as to whether the plaintiff's account had sufficient funds to pay out certain cheques that the plaintiff had issued to the claimant.

[5] It is the plaintiff's case in the present action that the defendant's assistant manager had without the plaintiff's consent and in breach of relevant legislations, wrongfully disclosed and provided the plaintiff's bank statements to third party, more specifically, the claimant's solicitors in Suit 509.

[6] In order to appreciate the plaintiff's claims in this action, it is necessary to give a brief narration of the events that had taken place at the proceedings in Suit 509, particularly, pertaining to the subpoenas that were served on En Zafri, the defendant's assistant manager.

Suit 509

[7] On 27 September 2018, the claimant's solicitors in Suit 509 served a sealed copy of a 'Subpoena to testify and produce documents' dated 24 September 2018 ('Subpoena dated 24 September 2018') to the Manager of the defendant's branch, requiring him to attend court from 2 October 2018 to 5 October 2018 with bank statements of the plaintiff's account for the period of six months from 15 July 2015 to 15 December 2015.

[8] En Zafri, who was the assistant manager at defendant's branch was tasked to attend court to testify and produce the relevant statements for the plaintiff's account in Suit 509 on 3 October 2018.

[9] On 3 October 2018, En Zafri duly attended at the trial of Suit 509. From the notes of proceedings for that day, it is clear that En Zafri did not hand over the bank statements to the court and/or to any of the parties to the proceedings during the course of his testimony.

[10] What is also clear from the notes of proceedings is that counsel for the plaintiff, Mr Sri Dev Nair (who happened to also act for the plaintiff in this action) had initially objected to En Zafri's attendance to give evidence on the plaintiff's account. The objection was premised primarily on the issue of confidentiality of the plaintiff's account.

[11] There is no dispute that the learned trial judge, after hearing the objection, had overruled the objection. However, she limited the questions to be asked of En Zafri to only the question expressly stated in the Subpoena dated 24 September 2018, namely – 'were there sufficient money in the account to honour the cheques at the date of the cheques?'

[12] There is also no dispute that during En Zafri's examination in chief, the bank statements were not handed over by En Zafri to any one including the court.

[13] Notwithstanding the aforesaid, based on the notes of proceedings, counsel for the plaintiff had during his cross-examination of En Zafri asked him on the bank statements of the plaintiff's account, particularly, the bank balances as shown in the statements for the relevant period.

[14] After En Zafri had completed his testimony on 3 October 2018, he left the court with the bank statements.

[15] The proceedings in Suit 509 continued on 22 November 2018. On that day, during cross-examination of another witness, Mr. Ananthan Vijayakumar ('Mr Ananthan'), counsel for the claimant, Mr Selvam Shanmugam ('Mr Selvam') had sought leave of the court to refer the witness to a copy of the plaintiff's bank statement.

[16] At this time, the learned trial judge was informed that the said document sought to be introduced was part of the documents that En Zafri had brought along with him pursuant to the Subpoena dated 24 September 2018 and that the documents were not produced to the court during En Zafri's testimony.

[17] Based on the notes of proceedings, Mr Selvam had informed the learned trial judge that the bank statements had been handed to him by En Zafri subsequent to his testimony. The notes of proceedings on 22 November 2018 at 12.33pm p. 38 recorded as follows:

YA So at that point in time, did Plaintiff did not have this document. A

SVS He handed it to me subsequently.

YA Handed subsequently.

SVS Yes.

YA Alright. Please show this document to Mr Neeko and also to Mr Suaran. Leave is granted. B

SVS Much obliged My Lady. ms38

[18] The learned trial judge thereafter directed Mr Selvam to show the document to counsel for the plaintiff and granted leave to counsel for the claimant to tender the document. C

[19] On 3 December 2018, during the continuation of his cross-examination of Mr Ananthan, counsel for the claimant sought to introduce further bank statements of the plaintiff's account. Again, the learned trial judge directed for copies of the documents to be shown to the plaintiff's counsel, Mr Suaran and granted leave for the documents to be adduced. D

[20] It must be pointed out that Mr Suaran had raised objection again to the documents contending that these bank statements ought to be tendered through En Zafri. Again, the learned trial judge dismissed Mr Suaran's objection. E

[21] Mr Selvam had also referred to the bank statements of the plaintiff's account to another witness, one Mr. Baskaran Manikam ('Mr Baskaran').

[22] These bank statements adduced by Mr Selvam through Mr Ananthan and Mr Baskaran were subsequently compiled and filed as an additional bundle of documents for the trial. F

[23] On 4 April 2019, the solicitors for the claimants in Suit 509 filed an application to recall En Zafri and pursuant to this application, the trial judge made the following orders:

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(i) Leave was granted to re-call En Zafri to verify the documents contained in Common Bundle of Documents (Additional-IV) and Common Bundle of Documents Agreement (Additional-V);

(ii) The claimant was allowed to refer the documents contained in Common Bundle of Documents (Additional-IV) and Common Bundle of Documents Agreement (Additional-V) to En Zafri; H

(iii) En Zafri to produce bank statement for Account CIMB No: 80-0091214-4 dated 31 July 2015, 31 August 2015, 1 September 2015, 31 October 2015, 31 November 2015 and 31 December 2015; and

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(iv) En Zafri to produce additional document, bank statement for account CIMB No: 80- 0091214-4 dated 31 January 2016.

('court order dated 4 April 2019')

[24] On 16 July 2019, En Zafri was recalled to give evidence pursuant to a Subpoena dated 12 June 2019. On this date, En Zafri had confirmed to the court the documents in the bundle of documents that was filed in the Suit 509 containing the bank statements of the plaintiff's account and he tendered the bank statements of the plaintiff's account dated 1 July 2015, 31 August 2015, 30 September 2015, 31 October 2015, 30 December 2015 and 31 January 2016.

[25] Significantly, the plaintiff's counsel, Mr Suaran had cross-examined En Zafri as to whether he had provided the plaintiff's bank statements to anyone before he went to court. The same line of questions was posed to him again and again to which En Zafri repeatedly answered and confirmed that he had not given the plaintiff's bank statements to anyone before he went to court on 16 July 2019. It is significant that Mr Suaran did not put to En Zafri the statement made by Mr Selvam to the court that he had obtained the bank statements from En Zafri subsequent to his testimony on 3 October 2018.

[26] When Mr Suaram asked En Zafri again if he was aware of his secrecy obligations under the Financial Services Act 2013, the learned trial judge interjected and stated that she had already overruled the questions on the issue of secrecy obligations when the same issue was raised by the plaintiff's other counsel, Mr Sri Dev, previously on 3 October 2018.

Present Action

[27] In this present action, it is the plaintiff's case that En Zafri had, without its consent or authority, released to Mr Selvam the bank statements of the plaintiff's account. In this regard, the plaintiff claims through PW1 and PW2 that En Zafri had, on 3 October 2018, handed over these bank statements to Mr Selvam outside the court room prior to the commencement of the trial of Suit 509.

[28] Details and information related to the plaintiff's bank account statements (Account no: 80-0091214-4) which was disclosed by the defendant's officer to the lead counsel for the plaintiffs in Suit 509 on 13 October 2018 are the bank statements dated 31 July 2015, 31 August 2015, 30 September 2015, 31 October 2015, 30 November 2015, 31 December 2015 and 31 January 2016.

[29] Both PW1 and PW2 testified that they were outside the court room on 3 October 2018 and saw Mr Selvam with En Zafri having a conversation in the morning before the proceedings commenced. Both of them claimed that they saw En Zafri gave the bank statements of the plaintiff's account to Mr Selvam who thereafter handed over the documents to an Indian lady for her to make copies.

[30] Additionally, the plaintiff also relied on the notes of proceedings on 22 November 2018 at 12.33pm for Suit 509 which I have alluded to above where Mr Selvam had informed the court that he had received the bank statements from En Zafri subsequent to En Zafri's testimony on 3 October 2018.

[31] On the other hand, it is the defendant's case that En. Zafri had never given to Mr Selvam the bank statements of the plaintiff's account at all and that En Zafri had only tendered the bank statements to the court when he was recalled on 16 July 2019. In fact, En Zafri had repeatedly maintained this position when he was asked more than once by Mr Suaran whether he had handed the bank statements to anyone prior to his testimony that day.

Issues For Determination

[32] Based on the aforesaid, the issues to be determined by this court are as follow:

(i) whether En Zafri did give to Mr Selvam the bank statements of the plaintiff's account. This is a question of fact. If the answer to this question is in the negative, this will dispose of the plaintiff's claims; and

(ii) in the event that the answer to question 1 is in the affirmative, whether the defendant is in breach of any statutory and or contractual duty to the plaintiff.

Court's Deliberation

[33] I will start my evaluating the credibility or otherwise of the testimonies given by PW1 and PW2.

[34] PW1 was at the material times the 'Admin Manager' of the law firm, Messrs Ponnusamy & Associates who was the claimant's lawyer for Suit 509. In this witness statement, PW1 described himself as a dispatch for the law firm. PW1 is not conversant in the English Language and required the assistance of an interpreter to translate the questions posed to him during the trial in this action.

[35] According to PW1's testimony, he and PW2 were standing together outside the court room on the morning of 3 October 2018. PW1 said he could not remember what time it was. He said that he saw Mr Selvam with a 'gentleman' which he identified as En Zafri. He said he and PW2 were about four to five metres away from Mr Selvam. PW1 claimed he could hear clearly the conversation (in English) between Mr Selvam and En Zafri and claimed that he saw En Zafri gave the bank statements of the plaintiff's account to Mr Selvam. PW1 claimed the documents consisted of more than four to five pages and that the first page of the documents bore CIMB bank's header.

[36] I find PW1's testimony to be incredulous. In the first place, PW1 himself admitted that he had never met En Zafri and would not have known if the 'gentleman' who allegedly was speaking to Mr Selvan on the morning of 3 October 2018 was indeed En Zafri. In fact, given that En Zafri had denied the meeting, it is doubtful if there was indeed such a meeting as claimed. Mr Selvam was not called by the plaintiff to confirm the meeting. More will be said of this later. Although PW1 also testified that PW2 told him that the 'gentleman' was a bank officer, the plaintiff did not seek PW2 to confirm this during PW2's testimony at all. What this means is that PW1's testimony as to what PW2 had said to him is mere hearsay and therefore inadmissible. In fact, PW2 had testified that the conversation between Mr Selvam and En Zafri was not loud and he did not pay any attention to the same.

[37] Further, PW1's testimony that his employer, Mr. Ponnusamy had told him that 'a bank officer was coming to give evidence that day' is also nothing more than hearsay evidence which cannot be admitted and considered by this court. Hence, PW1 had no basis to conclude that the 'gentleman' whom Mr Selvam was having the discussion was a 'bank officer' at all.

[38] I also note that PW1 had testified the presence of an Indian lady who was purportedly given the 'documents' by Mr Selvam to 'make copies'. Again, no attempts were made to procure the 'Indian lady' to corroborate PW1's evidence at all. Also, it seems to me that from the distance of four to five metres away, all that PW1 could have witnessed, if at all, would be that Mr Selvam had handed some documents to the Indian lady. PW1 could not have known the purpose for Mr Selvam doing so. PW1 did not testify that he saw the Indian lady returning with the documents and handing over the same to Mr Selvam or En Zafri.

[39] It is incredulous to suggest that from a distant of four to five metres, PW1, who had no knowledge of the nature of the documents involved in the Suit 509, was able to see and determined that the documents that were handed over by the 'gentleman' to Mr Selvam were the bank statements of the plaintiff's account, let alone that the purpose was for Mr Selvam to make copies of the same.

[40] Similarly, PW2 who is the director of the plaintiff, had testified that he was with PW1 outside the court room on the morning of 3 October 2018. Like PW1, he had little understanding of the English language as he too required an interpreter during his testimony to this court. According to him, after the trial had started, he went out of the court room and was standing with PW1 when he purportedly saw En Zafri having a conversation with Mr Selvam.

[41] According to PW2's evidence, he had walked out of the court room after the trial had started. However, if this were the case, then it would be impossible for PW1 to witness Mr Selvam to be out of the court room as Mr Selvam was conducting the trial for the claimant in court. Mr Selvam was the lead counsel for the claimant in Suit 509.

[42] It seems to me that PW2's testimony suffers from the same lack of credibility as PW1's testimony given that both of them were four to five meters from the alleged discussion between Mr Selvam and En Zafri. He would also not know the reason why Mr Selvam had handed over the documents to the 'Indian lady' since PW2 also did not state that he saw the Indian lady returning with the documents.

[43] In his testimony, En Zafri had maintained that he did not hand over the bank statements to anyone except the court and that he had possession of the bank statements on 3 October 2018 at all times. This could have been contradicted by the 'Indian lady' or Mr Selvam but the plaintiff had chosen not to call either of them to testify.

[44] If indeed PW2 had witnessed En Zafri giving his bank statements to Mr Selvam, it is odd that he did not bring this up to his solicitors' attention at the time given the vehement objections taken by his solicitors to the introduction of the same during En Zafri's testimony that day.

[45] Even more significant is the fact that PW2 had in his witness statement, stated that En Zafri had handed over the bank statements to Mr Selvam subsequent to En Zafri being released from his testimony on 3 October 2018. This contradicts his evidence that the bank statements were given on the morning prior to En Zafri's testimony.

[46] I also find it odd that on 22 November 2018 when Mr Selvam had sought to tender the bank statement through Mr Ananthan and had informed the trial judge that he was given the bank statements from En Zafri subsequent to his testimony on 3 October 2018, PW2 who was present in court did not instruct his counsel that he had witnessed En Zafri handing over the bank statements on 3 October 2018.

[47] Further, when En Zafri was recalled on 16 July 2019, counsel for the plaintiff did not put to him that Mr Selvam had informed the court that he had handed over to him the bank statements subsequent to his testimony on 3 October 2018. This despite the fact that En Zafri had repeatedly denied having given the bank statements to any person at all. After all, Mr Selvam was present when En Zafri made that denial and if this were true, this must necessarily mean that Mr Selvam was not telling the court the truth. By not challenging En Zafri's denial on 16 July 2019, counsel for the plaintiff must have taken to have accepted his testimony to that of Mr Selvam's unsworn statement to court.

[48] Accordingly, I am unable to accept both PW1's and PW2's evidence in respect of the event that had purportedly taken place on the morning of 3 October 2018 outside the court room where En Zafri was said to have handed over the bank statements of the plaintiff's account to Mr Selvam as contended.

[49] I will now deal with the plaintiff's reliance on what Mr Selvam had represented to the trial judge on 22 November 2018. The notes of proceedings on that day recorded Mr Selvam as having informed the trial judge that he was given the bank statements of the plaintiff's account from En Zafri subsequent to En Zafri's testimony on 3 October 2018. However, that was a statement from the Bar and not evidence given on oath.

[50] On the other hand, on 16 July 2019 when En Zafri was recalled to give evidence at the trial of Suit 509, Mr Suaran, counsel for the plaintiff had during cross-examination asked En Zafri whether he had provided the bank statements of the plaintiff's account to anyone before he attended the court that day and En Zafri had repeatedly answered and confirmed that he had not given the same to anyone, including counsel for the claimant. This was what the notes of proceedings state:

MHBH: Ok. Now, did you provide these documents prior to coming to court. Did you provide these docs to anyone?

Zafri: No.

MHBH: Including counsel for the Plaintiffs?

Zafri: No. I did not.

MHBH: Are you saying, for the 1st time, you're coming to court with these statements?

Zafri: Yes.

MHBH: You're saying you did not hand over a copy of the statements to anyone?

Zafri: Not at all

[51] In this action, learned counsel for the plaintiff had put to En Zafri the statement made by Mr Selvam to the court that he had given the bank statements to him subsequent to his testimony on 3 October 2018. This was expressly denied by En Zafri. The relevant exchanges are set out below:

says, 'Right. Produce documents'. And at page 601, 'So at that point in time, did the Plaintiff did not have this document?'. He handed to me, he handed it to me subsequently'. 'Handed subsequently'. And he says, 'Yes'. Now, my question, En Zafri, is, the Mr Selvam says that you handed it to him subsequently, those bank statements. Do you agree with that Mr Selvam said in this notes of proceedings?

ZAFRI He's lying.

[52] En Zafri also testified that he did not lodge any police report against Mr Selvam in respect of his statement to the court implicating him as the person who had given him the bank statements.

25	SDN	Ok. Yes, ok. Very well, you are denying it. Now, did you at
26		this point in time, this point in time when you denied it and
27		you also had the documents which I'd shown you earlier, the
28		notes of proceedings, did you lodge a police report because
29		you just said he was lying? Did you lodge a police report against Mr Selvam for lying on oath on 22.11.2018 that he gave:
31		
32	ZAFRI	Yes, Mr Sri, I, that was not advised, being advised from the legal team for me to do a police report.

[53] En Zafri has in this action continued to maintain his position that he had not given the bank statements of the plaintiff's account to anyone except the court. Neither the plaintiff nor the defendant in this case has procured Mr Selvam to clarify on his statement to the court on 22 November 2018.

[54] Learned counsel for the plaintiff contended that because it is the defendant's case that En Zafri had not given the bank statements to Mr. Selvam, the obligation, if any, to procure the attendance of Mr Selvam to testify rests with the defendant. On the other hand, learned counsel for the defendant had maintained that the obligation to procure the attendance of Mr Selvam lies with the plaintiff.

[55] It is trite law that he who alleges must prove his assertion and the onus is on the party who so asserts to prove the same. More specifically, ss. 101 and 103 of the Evidence Act 1950 provide:

> **Burden of proof**
>
> 101(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist. (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
>
> **Burden of proof as to particular fact**
>
> 103. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

[56] In the present case, the plaintiff's entire cause of action is premised on the allegation that the defendant had unlawfully disclosed and provided copies of the plaintiff's bank statements of the plaintiff's account to Mr Selvam or third party without its consent or authority. Clearly, the burden of proof to establish this allegation of fact must necessarily lie with the plaintiff. It would be for the plaintiff to decide whom they wish to call

to establish that fact to satisfy the court on the balance of probability that the defendant did indeed wrongfully give the bank statements of the plaintiff's account to Mr Selvam.

[57] Based on the evidence in this action, what is undisputed is that Mr Selvam's statement to the trial judge had been categorically denied by En Zafri. The question then is whether with the denial, the plaintiff has discharged its burden of proof without calling Mr Selvam to testify. To my mind, it is not for the defendant at all to call Mr Selvam as it is not the defendant who seeks to establish the allegation that Mr Selvam had been given the bank statements from En Zafri. This was the plaintiff's assertion.

[58] The fact that Mr Selvam had possession of the bank statements does not mean that the same was given to him by En Zafri. Mr Selvam could have obtained these documents from other sources.

[59] The plaintiff could have sued or even issued subpoena against Mr Selvam in this case to establish its assertion. He did not. Its failure to call Mr Selvam as a witness to testify as to how he had obtained the bank statements of the plaintiff's account from the bank's officer was not explained.

[60] I agree with learned counsel for the defendant that this failure by the plaintiff to call Mr Selvam would give rise to an adverse inference to be invoked under s. 114(g) of the Evidence Act 1950 against the plaintiff. Section 114(g) of the Evidence Act 1950 provides:

> **Court may presume existence of certain fact**
>
> 114. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> ILLUSTRATIONS
>
> (g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;

[61] In *Chan Yoke Lain v. Pacific & Orient Insurance Co Sdn Bhd* [1999] 1 CLJ 179; [1999] 1 MLJ 303, the Court of Appeal held at p. 185 (CLJ); p. 308 F-I (MLJ):

> … The presence of David Lim or his clerk who filled up the proposal forms would have cleared all doubt about the alleged non-signature of the deceased on D2. Not only was David Lim or his clerk not called, neither was any explanation given by the respondent company as to the non-availability of David Lim or his clerk who should be in the best position to give evidence on the signature in D2. The irresistible inference would be that if David Lim or his clerk is called, their evidence would be unfavourable to the respondent company …

[62] In respect of the question why Mr Selvam was not before this court to explain how he obtained the bank statements, PW2 just stated that he thought it was unnecessary to call Mr Selvam. The plaintiff did not provide any cogent reason to justify its failure to call Mr Selvam.

[63] Accordingly, this court is entitled to infer that if Mr Selvam were to be called as a witness in this case, his evidence would have been unfavourable to the plaintiff.

[64] Thus, it is my judgment that the plaintiff has not established on the balance of probabilities that the defendant had given the bank statements of the plaintiff's account to Mr Selvam and or any third party without the plaintiff's consent or authority.

[65] Based on the evidence before this court, the bank statements of the plaintiff's account were handed over by En Zafri only to the trial judge on 16 July 2019 during the trial of Suit 509 pursuant to the order by the trial judge who had held that these documents were relevant to the issues tried before her in Suit 509.

[66] In any case, it is also my judgment that the plaintiff had in fact waived its objection to the contents of the bank statements of the plaintiff's account from being disclosed when learned counsel for the plaintiff proceeded to cross-examine En Zafri on the contents of the bank statements on 3 October 2018.

[67] Further, by reason of the orders by the learned judge allowing Mr Selvam to tender the bank statements through Mr Ananthan and Mr Baskaran on 22 November 2018, the order dated 4 April 2019 by the trial judge requiring En Zafri to be to be recalled and tender the documents and her further order on 16 July 2019 allowing En Zafri to tender the bank statements, even if indeed En Zafri had given the same to Mr Selvam subsequent to his testimony on 3 October 2018 as alleged, it was of no moment by reason of the said orders made by the learned trial judge.

[68] Accordingly, based on my finding of the facts above, it is my judgment that the plaintiff's claims against the defendant have no merits at all and must be dismissed as the plaintiff has not discharged its burden of proof that the defendant had wrongfully disclosed its bank statements to Mr Selvam and or any third party.

[69] Notwithstanding the aforesaid, I will also deal with the causes of action relied upon plaintiff.

Defendant Did Not Comply With The Procedure Prescribed By Law To Produce Plaintiff's Account Statements In Court As Documentary Evidence

[70] According to the plaintiff, the defendant ought not to have accepted the subpoenas served in Suit 509 requiring disclosure and production of the bank statements of the plaintiff's account without objecting to the same.

[71] The plaintiff contended that the defendant should have taken the following steps to object to the subpoenas:

(i) notify the solicitors for the claimant in Suit 509 to withdraw the subpoenas for non-compliance with the procedure; and

(ii) if the solicitors for claimant in Suit 509 failed to adhere to the notice, the defendant should appoint the solicitors to set aside the subpoenas.

[72] Learned counsel for the plaintiff however is unable to refer this court to any statutory provisions and or case law in support of the 'procedural requirements' that he had proffered in respect of the subpoenas.

[73] With respect to learned counsel for the plaintiff, I am unable to accept his contention on the 'procedural requirements'. The subpoena *duces tecum* issued to the defendant were under the court seals and constitute an order to produce the documents stated therein to the court (See: *Dea Ai Eng v. Dr Wong Seak Shoon & Anor* [2007] 7 CLJ 337; [2007] 2 MLJ 357). In fact, it is a form of command to the person named in the subpoena to attend court at such time and date as may be stated therein (See: *Pit Stop Auto Accessories v. Tan Kock Siang; The Minister Of Communications (Applicant)* [1974] 1 LNS 112; [1974] 2 MLJ 79).

[74] To my mind, there is no legal requirement for the defendant to make an application to object or set aside the subpoenas at all. In this case, the plaintiff had notice of the subpoenas and counsel for the plaintiff was able to make his objections to the subpoenas at the trial of Suit 509, *albeit* unsuccessfully.

[75] Hence, I see no merits in the plaintiff's objection at all.

Breach Of Statutory Obligation Under Financial Services Act 2013

[76] The plaintiff submitted that the s. 133 of the Financial Services Act 2013 provides that defendant and/or defendant's officers shall not disclose any documents or information relating to plaintiff's affairs or accounts to third parties. Section 133 of the Financial Services Act 2013 provides that:

133(1) No person who has access to any document or information relating to the affairs or account of any customer of a financial institution, including:

(a) the financial institution; or

(b) any person who is or has been a director, officer or agent of the financial institution,

shall disclose to another person any document or information relating to the affairs or account of any customer of the financial institution.

(2) Subsection (1) shall not apply to any document or information relating to the affairs or account of any customer of a financial institution:

(a) that is disclosed to the Bank, any officer of the Bank or any person appointed under this Act or the Central Bank of Malaysia Act 2009 for the purposes of exercising any powers or functions of the Bank under this Act or the Central Bank of Malaysia Act 2009;

(b) that is in the form of a summary or collection of information set out in such manner as does not enable information relating to any particular customer of the financial institution to be ascertained from it; or

(c) that is at the time of disclosure is, or has already been made lawfully available to the public from any source other than the financial institution.

(3) No person who has any document or information which to his knowledge has been disclosed in contravention of subsection (1) shall disclose the same to any other person.

(4) Any person who contravenes subsection (1) or (3) commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million ringgit or to both.

[77] As such, the plaintiff submitted that the conduct of the defendant's officer in giving the bank statements of the plaintiff's account to Mr Selvam is a breach of s. 133 of the Financial Services Act 2013.

[78] However, s. 133 is not an absolute prohibition. Banking documents are permitted to be disclosed under s. 134 of the FSA read with Schedule 11 where:

(i) the customer has given his written consent in writing for such disclosure; or

(ii) there is a court order not lower than the Sessions Court compelling the bank to make such disclosure.

[79] More specifically, s. 134(1) and (2) and Schedule 11 thereto provide thus:

134. (1) A financial institution or any of its directors or officers may:

(a) for such purpose or in such circumstances as set out in the first column of Schedule 11, disclose any document or information relating to the affairs or account of its customer to such persons specified in the second column of that Schedule; or

(b) disclose any document or information relating to the affairs or account of its customer to any person where such disclosure is approved in writing by the Bank.

Schedule 11 of the Financial Services Act 2013

	First column	Second column
	Purposes for or circumstances in which customer documents or information may be disclosed	Persons to whom documents or information may be disclosed
6	Compliance with a court order made by a court not lower than a Sessions Court.	All persons to whom the disclosure is required to be made under the court order.

[80] Given that the bank statements of the plaintiff's account were tendered in Suit 509 pursuant to the court orders which I have referred to above, the plaintiff's claim based on a breach of s. 133 of the Financial Services Act 2013 by the defendant is also without merits.

Breach Of Statutory Obligation Under Personal Data Protection Act 2010

[81] The plaintiff next submitted that the disclosure of details and personal information and/or the bank statements of the plaintiff's account to Mr Selvam is a breach of s. 7 of the Personal Data Protection Act 2010 ('PDPA').

[82] Section 7 of the PDPA provides that:

7(1) A data user shall by written notice inform a data subject:

(a) that personal data of the data subject is being processed by or on behalf of the data user, and shall provide a description of the personal data to that data subject;

(b) the purposes for which the personal data is being or is to be collected and further processed;

(c) of any information available to the data user as to the source of that personal data;

(d) of the data subject's right to request access to and to request correction of the personal data and how to contact the data user with any inquiries or complaints in respect of the personal data;

(e) of the class of third parties to whom the data user discloses or may disclose the personal data;

(f) of the choices and means the data user offers the data subject for limiting the processing of personal data, including personal data relating to other persons who may be identified from that personal data;

(g) whether it is obligatory or voluntary for the data subject to supply the personal data; and

(h) where it is obligatory for the data subject to supply the personal data, the consequences for the data subject if he fails to supply the personal data.

(2) The notice under subsection (1) shall be given as soon as practicable by the data user:

(a) when the data subject is first asked by the data user to provide his personal data;

(b) when the data user first collects the personal data of the data subject; or

(c) in any other case, before the data user:

(i) uses the personal data of the data subject for a purpose other than the purpose for which the personal data was collected; or

(ii) discloses the personal data to a third party.

(3) A notice under subsection (1) shall be in the national and English languages, and the individual shall be provided with a clear and readily accessible means to exercise his choice, where necessary, in the national and English languages.

[83] As such, the plaintiff submitted that failure, refusal and/or negligence on the part of the defendant to give a written notice as soon as practicable on the disclosure of the bank statements of the plaintiff's account to Mr Selvam is a breach of s. 7 of the PDPA by the defendant.

[84] Again, with respect to learned counsel for the plaintiff, s. 7 of the PDPA has no application to the data of a corporate entity. Section 4 of the PDPA provides for the interpretation of "data subject" as follows:

"data subject" means an individual who is the subject of the personal data

[85] In the recent decision of *Newlake Development Sdn Bhd v. Zenith Delight Sdn Bhd & Ors (No 2)* [2021] 7 CLJ 88, the court ruled that the PDPA does not apply to the data of a body corporate. Further, the court also ruled that where the documents in question were relevant and admissible, a party could not use the PDPA as a shield to prevent the said documents from being produced at trial under the guise of personal data protection. In this regard, the High Court held at pp. 97 to 99 that:

A [43] Firstly, I do not think the PDPA applies in respect of the data of D1. As I understand it, the objection taken by D2&3 is that the bank statements disclose banking transactions pertaining to D1. So it is D1's banking transaction data that is sought to be prevented from disclosure. As such, the "data subject" in this case would be D1, being the person who is the subject of the data in question.

B [44] However, "data subject" is defined under s. 4 of the PDPA to mean "an individual who is the subject of the personal data". Obviously D1 is not an individual. It is a corporate entity. For that reason, I do not think the PDPA applies in this case with respect to D1.'

C **[86]** The court further held that:

[52] So for instance, if the court orders a party to give discovery or production of certain documents, that party cannot circumvent the court order by hiding behind the PDPA. That party would be under a legal obligation to provide the documents, in compliance with the court order for discovery of the documents. Or else risk being found to be in contempt D of court.

…

[54] In this instance however, the PDPA itself permits disclosure of documents if necessary for compliance with any legal obligation to which the data user is subject or for the administration of justice. Furthermore, E the PDPA grants an exemption in favour of disclosure of personal data that is necessary for the purpose of any court order or judgment.

[55] This is stipulated in s. 45(2)(d) of the PDPA which reads:

(2) Subject to section 46, personal data:

F ...

(d) that is necessary for the purpose of or in connection with any order or judgement of a court shall be exempted from the General Principle, Notice and Choice Principle, Disclosure Principle and Access Principle and other related provisions of this Act;

G **[87]** Hence, I agree with learned counsel for the defendant that the plaintiff's claim based on the PDPA is flawed.

Breach Of Statutory Duty/Procedure Under Bankers' Books (Evidence) Act 1949 (BBEA)

H **[88]** The plaintiff further submitted that the failure, refusal and/or negligence on the part of the defendant to object the subpoenas served on the defendant is a breach of statutory duty/procedure under s. 6 of the BBEA by the defendant whereby the defendant produced the account statement and/or to give evidence as a witness to prove the matters, transactions and I accounts of the plaintiff without a court order for special cause.

[89] Section 6 of BBEA provides that:

> **6. Case in which officer of bank not compellable to produce books, etc.**
>
> An officer of a bank shall not, in any legal proceedings to which the bank is not a party, be compellable to produce any banker's book the contents of which can be proved under this Act or to appear as a witness to prove the matters, transactions and accounts therein recorded, **unless by order of a Judge made for special cause.** (emphasis added)

[90] The plaintiff contended that the appearance of En Zafri simply based on the subpoena is an act of appearing in court by the defendant without being compelled to do so which amounted to breach of s. 6 of the BBEA by the defendant as the defendant had produced the bank statements of the plaintiff's account and or gave evidence as a witness to prove the matters, transactions and accounts of the plaintiff without a court order for special cause.

[91] Reliance was made to the recent case of *Protasco Bhd v. Tey Por Yee & Anor And Other Appeals* [2021] 9 CLJ 349; [2021] 6 MLJ 1 where the Federal Court decided (per Rhodzariah Bujang FCJ) that:

> (6) Section 130(3) of the Evidence Act 1950 ('the EA') provided that 'No bank shall be compelled to produce its books in any legal proceedings to which it is not a party, except as provided by the law of evidence relating to bankers' books'. It was patently obvious that the phrase in italics referred to the BBEA because it was enacted earlier than the EA. This was further justification to hold that s. 7 of the BBEA was not subject to O. 24 r. 7A of the ROC as was held by the Court of Appeal. The High Court rightly found that relevancy was the cornerstone of s. 7 and of all other discovery applications and that based on Protasco's pleaded claim, the banking documents sought for were relevant to show the money trail to prove or disprove Protasco's allegation of the flow of funds to the respondents (see paras 108 & 118-119).
>
> (7) The definition of 'banker's book' under s. 2 of the BBEA should be given a purposive interpretation with an 'updating' approach but in so doing, the meaning of 'any other book used in the ordinary business of a bank' in s. 2 should be confined *ejusdem generis* to 'ledgers, day book, cash book and account book' – which was what 'banker's book' was defined under s. 2 as including. So it could not include just any documents in the bank's possession. Recorded transactions between customer and banker would indeed qualify to be records or entries kept in the bank's ledger, day book, cash book and account book. 'Entry' was not defined in the BBEA but under s. 34 of the EA, it referred to entries recorded in a book of account regularly kept in the course of a bank's business – which was one of the conditions of admissibility under the said section (see para 133).

(8) The second leave question was answered in the affirmative only in so far as the words 'current practices in the ordinary business of a bank' related to technological advances in record-keeping and no other. The High Court judge rightly held that if the documents disclosed under the BBEA Orders came within the definition of 'banker's book' they were admissible as evidence, but if they did not, they were still admissible under the Evidence Act 1950 if the legal requirements for admission, particularly that of relevancy, had been satisfied. (see para 134)

[92] The plaintiff's submitted that as decided in the *Protasco*'s case, the BBEA is independent of civil procedure rules which means that the subpoena issued under the Rules of Court 2012 (civil procedure rules) are inapplicable where it involves banker customer documents like the statement of accounts.

[93] Again, with respect to learned counsel for the plaintiff, under s. 6 of the BBEA, the defendant may disclose banking information if the court orders it to do so.

[94] What the defendant bank has to do when its officer is served with a sealed court subpoena to attend court with documents? The defendant was not a party to Suit 509 and was not obliged to incur legal costs to make a formal application to set aside the subpoenas or insist on non-production of the plaintiff's bank statements. The defendant through DW1 thus attended court pursuant to the subpoenas and did not produce the plaintiff's bank statements until the trial judge ordered and permitted this, and answered questions only as posed by the trial judge and the plaintiff's own lawyers.

[95] The plaintiff's lawyers' objections to its bank statements being produced were repeatedly overruled by the trial judge. Further, as alluded to above, the plaintiff's own lawyers cross-examining En Zafri on the bank statements of the plaintiff's account had made the issue of secrecy otiose.

[96] As regards the case of *Protasco*, the plaintiff company, Protasco, sued, *inter alia*, its former directors for fraud and breach of fiduciary duties and sought to recover USD27mil from them. Protasco applied for a court order under the BBEA to be permitted to inspect and to take copies of the bankers' books and the related documents from the banks concerned. The High Court allowed such order (see para. 12 of the decision) and on appeal, the Court of Appeal set the order aside. Protasco appealed to the Federal Court.

[97] The issue before the court there was whether Protasco could be granted an order to inspect and to take copies of the bank documents pursuant to the BBEA, without also applying for a discovery order under O. 24 of the Rules of Court 2012. Whilst the Court of Appeal held that such discovery order must be obtained under O. 24, the Federal Court (in a majority decision) held otherwise, *ie*, *inter alia*, that the BBEA may be resorted to, for bank documents, independent of a discovery application under O. 24 r. 7A of the Rules of Court 2012.

[98] The facts in *Protasco* are very different from our instant case. What, however, is relevant from *Protasco* are the Federal Court's views, where the Federal Court noted that the BBEA was based on the United Kingdom's BBEA, and quoted the following English textbook excerpt from "*Disclosure*" (5th edn) with approval:

> [104]…that law was passed '… in order to get over the difficulty and hardship relating to the production of bankers' books. *If such books contained anything which would be evidence for either of the parties, the banker or his clerk had to produce them at the trial under a subpoena duces tecum, which was an inconvenience when the books were in regular use.* The leading object of this Act was to relieve bankers from that inconvenience'. It also enables, said the learned authors further, for an order to be made for pre-trial disclosure of documentary evidence in the hands of the banks relating to accounts held by parties to the litigation.
>
> [110] Citing, *inter alia*, Cotton LJ in *Arnott v. Hayes* (1887) 36 Ch D 731, learned counsel stressed, as held in the cited case, that the object of the *Bankers' Books Evidence Act 1879 is only to provide relief to a banker from having to attend court in order to produce at the trial his daily used books.*
>
> (emphasis added)

[99] It is pertinent to note the Federal Court also said at para. [29] at p. 372 in CLJ that:

> [118] I fully appreciate the existence of the Financial Services Act 2013 which makes it an offence to disclose a person's banking transactions or details and that safeguard is enhanced by s. 130(3) of the Evidence Act 1950 which I had reproduced earlier in para. 14. However, as it is clear from the words 'except as provided by the law of evidence relating to banker's books' in the said sub-section, it is patently obvious that the law recognises a leeway and that 'law of evidence relating to banker's book' definitely refers to the Act because it was enacted earlier than the Evidence Act 1950. This consideration is further justification for me to hold that s. 7 of the Act is not subject to O. 24 r. 7A as held by the Court of Appeal. Of course, as rightly found by the learned High Court judge, the general rule of evidence, that is relevancy, is the cornerstone of s. 7 and all other discovery applications. His Lordship was equally right when he considered that from the pleaded claim of the plaintiff, the money trail is relevant to prove or disprove its allegation of the flow of funds to the respondents.

[100] The Federal Court clearly acknowledged that a bank officer may be compelled to produce the banking documents at trial if the bank is compelled to do so pursuant to a writ of subpoena issued, and if such documents to be produced are relevant to the proceedings.

[101] In our case, the trial judge had considered the relevancy of the bank statements of the plaintiff's account and decided that these documents were crucial for Suit 509 and that En Zafri had to produce the same to court and be examined in Suit 509.

[102] It seems to me that the protection of confidentiality and secrecy accorded to a party in the Financial Services Act 2013, the BBEA and the PDPA has to be balance with the interest of the court to have available before it the relevant information and fact in order for the court's determination of the legal and factual issues that are being confronted in any of its proceedings. In this instant, the defendant's duty of secrecy owed to the plaintiff is outweighed by the requirements of the Evidence Act 1950, in particular, s. 132 thereto and En Zafri was obliged to disclose the bank statements of the plaintiff's account to assist the court in Suit 509.

[103] The trial judge in Suit 509 had already decided that claimant's case rests on the issue of sufficiency of monies in the plaintiff's account and that the bank statements were crucial to the case and the court had to be vigilant to ensure there was no abuse of the court's process by disallowing cross-examination by the claimant's lawyers on documents/matters pertaining to such issue.

[104] In the Federal Court case of *B A Rao & Ors v. Sapuran Kaur & Anor* [1978] 1 LNS 14; [1978] 2 MLJ 146, Raja Azlan Shah FJ set out the principle of s. 162 of the Evidence Act 1950 at pp. 150 and 151:

> In this country, objection as to production as well as admissibility contemplated in sections 123 and 162 of the Evidence Act is decided by the court in an enquiry of all available evidence. This is because the court understands better than all others the process of balancing competing considerations. It has power to call for the documents, examine them, and determine for itself the validity of the claim. Unless the court is satisfied that there exists a valid basis for assertion of the privilege, the evidence must be produced. This strikes a legitimate balance between the public and private interest. Where there is a danger that disclosure will divulge, say, State secrets in military and international affairs or Cabinet documents, or departmental policy documents, private interest must give way. It is for the court, not the executive, ultimately to determine that there is a real basis for the claim that "affairs of State is involved", before it permits non-disclosure. While it is clear that the final decision in all circumstances rests with the court, and that the court is entitled to look at the evidence before reaching a concluded view, it can be expected that categories of information will develop from time to time. It is for that reason that the legislature has refrained from defining "affairs of State." In my opinion, "affairs of State", like an elephant, is perhaps easier to recognise than to define, and their existence must depend on the particular facts of each case.

> … In the administration of justice nothing is of higher importance than that all relevant evidence should be admissible and should be heard by the tribunal that is charged with deciding according to the truth. To ordain that a court should decide upon the relevant facts and at the same time that it should not hear some of those relevant facts from the person who best knows them and can prove them at first hand, seems to be a contradiction in terms. It is best that truth should be out and that truth should prevail.

[105] In *Raja Segaran S Krishnan v. Bar Council Malaysia & Ors* [2001] 2 CLJ 44, it was said at pp. 50 to 52:

> It is trite law that the courts go to great lengths to ensure that all available relevant evidence is before them so that the courts can arrive at a just decision …
>
> It seems to me that this claim to privilege by virtue of the proviso to maintain secrecy, ought to be given a narrow and restrictive meaning and most sparingly exercised. In fact in *Robinson v. State of South Australia* the Privy Council went on to say at p. 716 as follows:
>
> ... In truth the fact that the documents, if produced, might have any such effect upon the fortunes of the litigation is of itself a compelling reason for their production – one only to be overborne by the gravest considerations of State policy or security.

[106] In *Rotta Research Laboratorium SPA & Anor v. Ho Tack Sien & Ors; Chai Yuet Ying (Third Party) (No 2)* [2011] 1 LNS 597; [2015] 4 MLJ 222, the subpoenaed witness was prohibited under the Sale of Drugs Act 1952, from producing the original copy of some confidential document which was classified as an official secret. On this issue, Mah Weng Kwai JC (as he was then) held in paras. 88 to 90:

> [88] Section 162 of the EA 1950 requires a witness summoned to produce such document notwithstanding any objection to its production or to its admissibility and that any such objection is to be decided by the court. Thus, it was held by Raja Azlan Shah FJ (as His Highness then was) in *BA Rao & Ors v. Sapuran Kaur & Anor* [1978] 2 MLJ 146 that in this country, objection as to production as well as admissibility contemplated in ss. 123 and 162 of the Evidence Act is decided by the court in an enquiry of all available evidence.
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> [89] PW9 relied on s. 9(4) SDA 1952 on the ground that exh. P80 is a confidential document and that if there is disclosure of it, there will be a breach of trust on the part of the DCA. On this point the court is of the view that s. 9(4) of the SDA 1952 only proscribes an offence and provides for a penalty against an officer acting in breach. The section does not override the operation of s. 132 of the EA 1950 which provides that a witness is not excused from answering a question on the ground that an answer will criminate, (see *Attorney General of Hong Kong v. Zauyah Wan*

Chik & Ors and another appeal [1995] 2 MLJ 620 [1995] 3 CLJ 35). In effect, s. 132 of the EA 1950 does away with the privilege against self-incrimination. The issue of confidentiality is not a bar to the admissibility of any document, when relevant, in court.

[90] PW9 expressed her fears that if she were to disclose exh. P80 to the court, she would be liable (personally) for the breach of confidentiality. It would appear that PW9's fears are misplaced as where a disclosure is ordered by the court there can be no breach of trust or confidentiality on her part. In the case of *Marcel v. Commissioner of Police* [1992] Ch 225 Nolan LJ at p 261 held that 'there is no duty of confidence where the disclosure is made in obedience to the law which required it to be made'

[107] In the premises, based on the aforesaid cases, it is my judgment that there was no wrongful disclosure whatsoever of the bank statements of the plaintiff's account by the defendant under s. 6 of the BBEA as claimed by the plaintiff.

Breach Of Obligation Under Contract Law

[108] The plaintiff submitted that the defendant has breached the implied duty of good faith and fair dealing between the plaintiff and the defendant in their contractual relationship where the defendant failed, refused and/or neglected to act in good faith and to play fair in disclosing the plaintiff's account statements to the third party as:

(i) non-compliance with procedure and/or rules and/or practice on being a subpoena witness and in relation to the subpoena which has been served;

(ii) failure to put the plaintiff's interest first as customer to the defendant;

(iii) failure on the part of defendant to get proper instruction from the plaintiff in respect to the subpoena. If the plaintiff gave consent, then the defendant may disclose the bank statements to third party. If the plaintiff opposed to it, then the defendant shall object to the subpoena due to the fact that there is no court order; and

(iv) failure to take reasonable measures to avoid unlawful disclosure of statements of account to the third party.

[109] Learned counsel for the plaintiff has not referred this curt to any case law that supports the existence of any duty on the part of a bank with regards to the propositions (i) to (iii) above.

[110] Learned counsel for the plaintiff had sought to rely on the tort of negligence as the basis for the breach of duty by the defendant. This is notwithstanding that the plaintiff's relationship with the defendant is one based on contract.

[111] The plaintiff has signed the account opening application form and declared under cl. 8 thereof that the plaintiff expressly agreed and authorised the defendant to disclose to any person any information about or with regard to its affairs and/or banking accounts as authorised by law or for such purposes as the defendant deems fit in its interest to do so.

[112] With such written consent, the defendant's disclosure of the information/documents of relating to its affairs or account is permitted under the law, as the trial judge had made the requisite order on 4 April 2019 for the disclosure of the bank statements of the plaintiff's account as well as allowed the claimant's solicitor's leave to tender the said documents through En Zafri.

Breach Of Fiduciary Duty Under Common Law

[113] The plaintiff submitted that the conduct of the defendant is a fiduciary breach of duty by the defendant whereby the details and personal information and/or the bank statements of the plaintiff's account which is private and confidential has been reproduced, given, divulge, revealed and published to any third party.

[114] It is contended that as a financial service provider to the plaintiff, the defendant has fiduciary duty towards the plaintiff which includes for the plaintiff to ensure the details and personal information and/or plaintiff's bank account which is private and confidential not to be reproduced, given, divulge, revealed and published to any third party.

[115] With respect, the plaintiff's current account with the defendant only concerns deposits and withdrawals. The relationship between the plaintiff and the defendant was therefore one of creditor and debtor, and not a fiduciary one.

[116] In the case of *Aseambankers Malaysia Bhd & Ors v. Shencourt Sdn Bhd & Anor* [2014] 2 CLJ 773 at pp. 881 to 882, the Court of Appeal affirmed the High Court decision of *Kian Lup Construction v. Hongkong Bank Malaysia Bhd* [2002] 7 CLJ 32; [2002] 7 MLJ 283 and adopted what was stated therein, held at p. 51 (CLJ); p. 882 (MLJ):

> Generally, banking institution provides a number of basic financial and advisory services to customers, namely:
>
> (1) Traditional banking facility where customers deposit the monies with the bank and the bank is liable to repay the money when demanded or instructed by the customer ...
>
> (2) Financial and advisory services where the bank is appointed by the customer to be the customer's adviser on matters relating to financial and advisory services. Usually these services are in addition to the first additional services stated above.

A (3) Financial facility where the bank provides loan or other financial facilities to customers such as overdraft facilities. In this category, the bank is a Lender and the customer is a Borrower.

...

B As for the third instance, *ie*, where the bank provides a loan or financial facility to the customer, the relationship is also one of the Debtor and Creditor. In this case, the bank is a Creditor (Lender) and the customer is a Debtor (Borrower). *From the above 3 scenarios, only the second instance involves a fiduciary relationship between the bank and the customer, while in the first and third instances, the relationship between them is merely contractual, ie, only as debtor and creditor, not fiduciary* (emphasis added)

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[117] Further, in *Foley v. Hill & Others* [1843-60] All ER Rep 16, the House of Lords recognised that where a bank receives a customer's monies, it is a debtor-creditor relationship and not one with any fiduciary character.

[118] Therefore, the plaintiff's cause of action based on breach of fiduciary D duty simply cannot be sustained.

Conclusion

[119] In the light of the above, it is my judgment that the plaintiff has failed to prove its case.

E **[120]** Hence, the plaintiff's action against the defendant is dismissed with costs fixed at RM50,000 subject to allocator.

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